# In the Supreme Court of the United States

**OCTOBER TERM 1941.**

## No. .....

THE NORTH ELECTRIC MANUFACTURING COMPANY,
*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### OPINIONS BELOW.

The opinion of the Circuit Court of Appeals is reported in 123 Fed. (2) 887 and appears at R. 879.

The decision and order of the National Labor Relations Board is reported in 24 N. L. R. B. No. 52 and appears at R. 808 to 856 inclusive.

### JURISDICTION.

The jurisdiction of this Court is invoked under Section 160e of Title 29 of United States Code (49 Stat. 452) and Section 240(a) of the Judicial Code as amended (28 U. S. C. A. Sec. 347).

The judgment of the Circuit Court of Appeals was entered November 12, 1941 (R. 877).

### STATEMENT OF THE CASE.

The petition requests a review of the decision of the Sixth Circuit Court of Appeals on two questions of primary importance to the equitable administration of the National Labor Relations Act, namely:

(1) What are the limitations on the right of an employer, either directly or through an employee, to speak freely concerning the value of union membership.

(2) What power must an employee have in order to bind the employer by his actions or words.

In this case the petitioner is charged with the words and actions of the President of the Company because of his insertion in a local newspaper of an advertisement which stated a possibility of a connection between a drive for union membership and the activity of its sole competitor.

The petitioner is also charged with the statements of three of its employees who hold positions but slightly higher in authority than any other workman in the factory.

This employer is also charged with the action of one of its Superintendents who asked certain of the employees to determine by an oral poll the sentiments of the various employees, as to their estimation of the value of union membership.

Each one of these several actions directly raises the question of whether or not it constitutes an unfair labor practice within the meaning of Section 7 of the National Labor Relations Act. Petitioner believes that these actions were within the Constitutional rights of the petitioner and its employees and by reason thereof the finding of the Circuit Court that these actions constituted a violation of the National Labor Relations Act is erroneous.

The second question presented to this Court arises out of the finding of the National Labor Relations Board that the employer should be charged with the action of certain employees in circulating a petition requesting an open shop and in charging the employer with the statements of certain employees who are alleged to have supervisory status.

It is the position of the petitioner that considering the duties, power and authority of these employees, the National Labor Relations Board and the Circuit Court of Appeals erred in charging their actions to the petitioner.

## I. THE RIGHT OF AN EMPLOYER TO SPEAK FREELY.

### (A) The Newspaper Advertisement of April 29, 1938.

The President of the Petitioner, Frank R. McBerty, inserted in the Galion newspaper a full page advertisement, a complete copy of which is set out in the record at page 701.

The facts leading up to this action are as follows:

Since early in January of that year, the *International Association of Machinists,* affiliated with the American Federation of Labor, had been conducting a drive for members employed at the North Electric Manufacturing Company (R. 148).

The record is silent as to the success or failure of this drive. However, on April 28th a labor organizer, employed by the *International Brotherhood of Electrical Workers,* came to Galion and instituted a drive for members (R. 652). In the first handbill distributed by this organizer, a comparison was made between the wages paid by the North Electric Manufacturing Company and that of a competing Company (R. 773). This competitor was unquestionably the Automatic Electric Company, Inc. of Chicago, Illinois, which company had a closed shop contract with the International Brotherhood of Electrical Workers (R. 654). This company is the only competitor of the petitioner.

When the activity of the new organizer came to the attention of Mr. McBerty, he concluded that there was a connection between the Automatic Electric Company and the activity of the Electrical Workers Union (R. 71). To present his views to the public, the stockholders of the petitioner and its employees, he prepared a complete statement of the facts upon which he predicated his conclusion. This

statement of facts is the advertisement of April 29, 1938 (R. 701).

The only evidence as to the purpose of this advertisement is the statement of Mr. McBerty that he wished everyone to be acquainted with the facts and the conclusion to which he had come concerning the drive of the Chicago union which had just opened a campaign in Galion (R. 7, 77). This advertisement was merely a statement by Mr. McBerty that he believed a competitor was responsible for the union drive. It cannot in any aspect be considered a threat by the employer. Rather than risk a misconception that might have resulted if his views had been given orally, Mr. McBerty adopted the medium of a newspaper, where his words could be weighed and his statements examined. The only conclusion can be that the advertisement is a statement of fact and opinion by the President of the petitioner concerning the activities of a new union in the community. Nevertheless the Sixth Circuit Court of Appeals held this statement of fact and comment (we believe erroneously) to be a privilege denied to the employer under the National Labor Relations Act.

Since the decision of this case in the Circuit Court, this Court has announced its decision in the case of the *N. L. R. B. vs. Virginia Electric & Power Company*, — U. S. —, 86 L. Ed. 306, 62 Sup. Ct. 344 (December 22, 1941). In that case the Court had before it the question of whether the posting of a bulletin by an employer throughout its plant, constituted an unfair labor practice. This Court upheld the right of the employer to speak freely concerning any controversial issue, saying that:

> "Neither the act nor the Board's order herein enjoins the employer from expressing its view on labor policies or problems, nor is a penalty imposed upon it because of any utterances which it has made. The sanctions of the act are imposed, not in punishment of the employer, but for the protection of the employees. The employer in this case is as free now as ever to take any side it may choose on this controversial issue."

There, as in this case, the Board held that the utterance of the employer was an unfair labor practice even though this utterance is unconnected with any other activity of the employer which was detrimental to the union. In the instant case the advertisement stands alone and unconnected with any other act or indication of hostility to a union. If this Court is to follow its most recent opinion, it should grant the writ in this case and review the decision of the case below.

Similar problems have been presented to the several Circuit Courts.

These decisions have all held that it is the employer's right to express an honest opinion so long as it does not constitute domination or interference, and an attempt to deprive an employer of this right would be unconstitutional, since contrary to the First Amendment to the Constitution of the United States. (*N. L. R. B. vs. The Union Pacific Stages, Inc.*, 99 Fed. (2nd) 153 (C. C. A. 9th, 1938); *Jefferson Electric Company vs. N. L. R. B.*, 102 Fed. (2nd) 949 (C. C. A. 7th, 1939); *Continental Box Company vs. N. L. R. B.*, 113 Fed. (2nd) 93 (C. C. A. 5th, 1940).)

The most recent pronouncement of any Circuit Court is that of the Seventh Circuit Court of Appeals in the case of *N. L. R. B. vs. Gutmann & Company*, 121 Fed. (2nd) 756 (1941). In this case the employer had distributed a pamphlet to its employees which stated that for over 47 years the employer and employees have "all pulled together as one harmonious family," and that the "workers have not found it necessary to strike to get a fair and square deal." The employer then went on to say that, "There is no record that any agitator can run a factory, get orders to fill, provide a single week's work, furnish a single steady job or a family a full dinner pail—we have done this steadily for over 47 years." This language was held to be privileged and non-coercive.

In the light of the decision of this Court in the *Virginia Electric Company* case and the decisions in other Circuits,

the Circuit Court of Appeals of the Sixth Circuit is manifestly wrong and the writ sought by the petitioner should be granted so as to provide for an equitable administration of the act within the confines of the Constitution of the United States, particularly the right to speak freely as guaranteed to our citizens by the First Amendment to the Constitution.

### (B) The Statement of Certain Employees.

Each of these statements was made under different circumstances at different times, to different employees for different reason. In no case has the Board attempted to find any connection between these several statements. Each stands alone and must be considered separately. In each case petitioner contends that the statements in question were made by persons erroneously held to be supervisory employees, as argued in the second part of this brief.

#### Statement of Paul Helfrich.

At one time Neuman, a welder who testified as a witness for the Board, asked Paul Helfrich what he thought about a union. The Board found Helfrich's answer to be:

> "I told him I thought that if it (the Union) went through that there would be quite a bit less work, the company would not be able to get as much work, and that the experience I had, that that is about the only job I ever lost, was when I worked at the Erie shop * * * and that I went right into one again * * * I said that at different times I helped picket * * * I might have gave him the impression that I never gained anything by belonging." (R. 457.)

This is the sole statement by Paul Helfrich charged by the Board to the Petitioner.

Even assuming then that this man is a supervisor and as such can charge an employer with his acts, the question then before this Court is this: If a supervisory employee gives an opinion adverse to a union in response to a

question asked by a fellow employee, is the employer to be charged with offending the National Labor Relations Act? On this question the Courts have given a unanimous answer that the employer shall not be charged by the employee's unfavorable answer, since such comments must be regarded as within that area of free discussion that is guaranteed by the Constitution (*Thornhill vs. Alabama,* 310 U. S. 88 (1940); *N. L. R. B. vs. Falk Corp.,* 102 Fed. (2nd) 383 (C. C. A. 7th, 1939), reversed on other grounds 308 U. S. 453; *Midland Steel Products Company vs. N. L. R. B.,* 113 Fed. (2nd) 800 (C. C. A. 6th, 1940); *Humble Oil & Refining Company vs. N. L. R. B.,* 113 Fed. (2nd) 85 (C. C. A. 5th, 1940)).

It is to be noted that no part of the comment by Paul Helfrich contains a threat. There is no statement indicating coercion. It is nothing more than the individual's conclusion concerning the value of Union membership. The right to make such a comment is guaranteed by the First Amendment to the Constitution of the United States. This right of free speech should not be abridged by such an interpretation of the Labor Act as here attempted by this administrative tribunal.

We believe that this Court will declare that the National Labor Relations Act does not suspend or alter the rights of individuals under the First Amendment to the Constitution.

**Statements of H. A. Helfrich.**

The Board has charged the Petitioner with statements made by Helfrich to a group of employees when an argument occurred and to one Wittibslager concerning this man's work. There is no question that Helfrich said in an argument with a group of employees:

> "They (union leaders) are nothing but a bunch of racketeers and liars. All they are after is your $3.00 and after that they will leave you flat." (R. 545.)

This remark was somewhat similar to the remarks of the foreman in the case of *N. L. R. B. vs. The Empire Furniture Company,* 107 Fed. (2nd) 92 (C. C. A. 6th, 1939). There one foreman said that the C. I. O. were "a bunch of communists fit to stir up trouble." However, the Court set aside the order of the Board, saying:

> "There is no evidence that these observations reflected the view of respondent's management, that the foremen were expected to, intended, or did permit their personal views upon organization to influence them in the hiring or discharging of employees."

The Board has charged petitioner with certain statements of Helfrich to Wittibslager concerning the company's attitude towards unionism. (R. 828.) These remarks are extremely similar to the remarks of the forelady in *Cupples Company, Manufacturers vs. N. L. R. B.,* 106 F. (2nd) 100 (C. C. A. 8th, 1939). In this case the statements were as follows:

> "During June 24 and 25, 1937, Irene Weitzel talked to many of the girls on the penny match machine about the union activities which were taking place. She made statements to individual girls to the effect that it was all right for them to go to the 'A. F. of L.' (American Federation of Labor) meeting, but to watch what they signed; that it would be best for them to join the independent union, which she referred to as the 'Company union'; that a girl that needed a job should 'stick with the company'; that if the A. F. of L. tried to organize the employees the Company would close down; that the Company would not stand for a union; that they had been in business many years and had never had a union and that they would shut down the plant before they would have trouble with any union; that she had to hold her job like the rest and she wanted to go 'Company union'; that if the A. F. of L. came in it was taking the bread out of her mouth; that the married girls had something to fall back on, but that if the plant closed she had nothing to fall back on. She told one girl that she had better sign the petition for the

> independent union because it was her (Miss Weitzel's) bread and butter and therefore bread and butter for all of them, and that if the girl did not sign there would be a six months' layoff. She told this same girl that signing up with the A. F. of L. would make trouble. She asked another girl to sign the petition for the independent union before leaving the factory in the evening or else be laid off for a period of a few weeks or maybe six months."

Even in the light of these statements, which go far beyond those found in the instant case, the Court held that the order against the employer should be set aside. This holding cannot be reconciled with the decision in the instant case.

**Statement of Elmer Yeager.**

The particular statement of Yeager cited by the Board as constituting an unfair labor practice was (R. 827):

> "Yeager, after advising Haspeslagh of the result of the poll in the punch-press department, told Febus that Haspeslagh 'didn't like this 100 per cent department worth a damn' and asked Febus if he 'wanted to change (his) mind.' "

Even considering Yeager a supervisory employee, the testimony on page 290 of the record, upon which this finding is based, does not substantiate a finding that The North Electric Manufacturing Company *interfered with, restrained or coerced* Febus in the exercise of any right guaranteed him under Section 7 of the National Labor Relations Act. Yet this is the finding of the Board. (R. 832.) This finding is made in the face of the fact that Febus had been a union member for sixteen years (R. 292); that he still continued as a member of the Union (R. 289); that his status had remained unchanged even after he refused to change his mind. (R. 292.)

A similar situation arose in the case of *N. L. R. B. vs. Express Publishing Company,* 111 Fed. (2nd) 588 (C. C. A.

5th, 1940), modified in other respects by the Supreme Court, 312 U. S. 426, wherein the Court held:

> "Some of respondent's employees had come directly to it, asking what would be the effect of their joining the union. It undertook to tell them what its understanding of the matter was, and told them truthfully. Its spokesman offered to testify that he did not intend any interference with union activities, and, to prevent his doing so, the complaint was amended by striking out the allegation about intention and substituting an allegation that it had the effect of obstructing the union. No evidence whatever was introduced that it had any such effect on anybody. The employee who had propounded the question went ahead and joined the union and that is all we have on the subject. We find no evidence to support the finding that what respondent did in this respect was an unfair labor practice."

This statement by Yeager to Febus, as well as the statements of Paul Helfrich and H. A. Helfrich cannot under reason or authority be found to have influenced, interfered or coerced the employees of the North Electric Manufacturing Company. The words "Influenced," "Interference" and "Coercion" as used in Sections 7 and 8 of the National Labor Relations Act do not prohibit the normal relations and innocent communications which are part of our free intercourse, especially between employer and employee. These words mean pressure or the use of authority or power to induce action in derogation of what the Statute calls "Self-organization." The phrase covers the abuse of a relation or opportunity so as to corrupt or overrule the will of another. These words are used with the same meaning as found in their well known application of the law with respect to fraud, duress and undue influence (*Texas & N. O. R. Co. v. Railway Clerks,* 281 U. S. 548—1930).

## II. WHAT EMPLOYEES HAVE SUFFICIENT AUTHORITY TO BIND AN EMPLOYER BY THEIR ACTION OR WORDS.

To determine the question of what employees have sufficient supervisory status so as to charge the employer with their actions, it is necessary to examine the general division of authority amongst the many employees of the entire organization of the petitioner, in the light of the nature of the product and the division of the work. The petitioner, a manufacturer of an automatic telephone exchange, requires extreme accuracy in each individual operation, and therefore requires that each employee does his individual task with a maximum of efficiency. The only satisfactory supervision of such operations comes through inspection by the management—not through an overseer or straw boss.

In the plant of the petitioner there is an entirely separate force of men under the direction of a Superintendent, which is exclusively charged with the duties of inspection. The inspectors have no relation to and are independent of the production workers. They keep accurate reports as to the number of units produced and the number rejected. This gives the Production Department an opportunity to determine the amount of the work of an employee and the manner in which it is being done.

Each workman when coming to the plant, must receive careful and complete instructions concerning his individual job. The instructors are fellow employees. Naturally only those employees who have been with the company for many years and who have adequate ability and experience are called upon to explain the work to a new employee. Because of the fact that such an employee may be frequently called upon as an instructor, the new employee may consider him a superior. However, the mere fact that an employee is an instructor or is more experienced or is higher

paid, does not lead to the conclusion that he has authority sufficient to charge the employer with his actions.

Certain employees who testified at the trial referred to these instructors as "foremen" or "bosses." The fact that a workman refers to a man as a "boss" or "foreman" does not define or increase his actual authority. The issue is not the name by which he is called but the power which he possesses. (*Cupples Company, Manufacturers vs. N. L. R. B.*, 106 Fed. (2nd) 100 (C. C. A. 8th, 1939), *Ballston-Stillwater Knitting Company vs. N. L. R. B.*, 98 Fed. (2nd) 758 (C. C. A. 2nd, 1938).)

We are particularly concerned with the question of whether or not seven men, to wit: Paul Helfrich, H. A. Helfrich, Yeager, Lucius, Christman, Spangler and Brown, have a supervisory status in the organization of the petitioner, as held by the decision below. In some instances, these men assign the daily tasks to certain fellow employees who do different operations on different days (R. 539). There is no evidence that it was their specific duty to report inefficiency, inability or inactivity of any particular employee, although some of these men had reported such incidents to the Supervisors or Superintendents (R. 408). However, it is clear that when such a report was made, it was not accompanied by a recommendation of action. Only a statement of facts was made to this superior who upon such statement could take such action as his authority permitted. These seven men had absolutely no power to hire or discharge any employee with whom they work, nor did they have the power to recommend hiring or discharging employees (R. 595). They had no power to raise or lower wages or to recommend an increase or reduction of wages (R. 597). They had no power to lay off a man, nor did they have the power to recommend that a man be laid off (R. 390). Since this is the limit and extent of their powers, their status as an employee is but a little higher than that of the status of any other employee of the company who

has become proficient in his work. Their status does not justify the Board in charging the statements and actions of these men to their employer. (*Ballston-Stillwater Knitting Company vs. N. L. R. B. supra.*)

There is no evidence whatsoever in the record that these men were ever held out by the petitioner as persons having authority to counsel others concerning the advisability of joining or not joining a labor organization. (*Cupples Company Manufacturers vs. N. L. R. B. supra.*) Furthermore, whenever it came to the attention of the officers of the petitioner that the employees holding these positions were making anti-union statements on company time or on the company premises, they were warned by the officers of the company to stop such actions and interest themselves in the work to be produced. (R. 555.) (*N. L. R. B. vs. Mathieson Alkali Works, Inc.*, 114 Fed. (2nd) 796 (C. C. A. 4th, 1940).)

We also wish to point out that the union claims jurisdiction over each of these men named as supervisory employees (R. 479, 508). If the union had been successful in negotiating a closed shop contract as requested by it (see Board's Exhibit 6), these men would have lost their right to bargain individually with their employer. If the union had represented 70% of the employees of the petitioner as it claimed (R. 742), it would have represented these men in all matters relating to wages, hours and working conditions. Certainly then these men should not be denied the right to take affirmative action as individuals to protect what they thought were their best interests. (*Humble Oil & Refining Co. vs. N. L. R. B.*, 113 Fed. (2nd) 85 (C. C. A. 5th, 1940).) They did not want to be represented by the union. They would have been represented by the union had it been successful. To prevent them from taking reasonable steps in their own interest is to deny these employees rights guaranteed them under the First and Fifth Amendments of the Constitution of the United States. (*N. L. R. B. vs.*

*Tex-O-Kan Flour Mills Company,* 122 F. (2nd) 433 (C. C. A. 5th, 1941).)

At first glance the case of the *International Association of Machinists vs. N. L. R. B.,* 311 U. S. 72 (1940) would appear to decide this question adversely to the petitioner. However, in that case, we find a continuous course of conduct, directly sponsored by the highest officers of the company, seeking either to intimidate the men or to prevent the full operation of the union. We find the officers of the company themselves actively interested in an organization opposed to the U. A. W., which had filed the charges against the petitioner. These actions, coupled with the actions of certain men of doubtful supervisory status, indicate that there was in that case a direct causal connection between the action of the officers of the company and the action of the straw bosses. However, in the instant case, not the slightest evidence was produced to show that at the time of the action of the men here held to be supervisors, the petitioner, through its officers or superintendents, had given any indication as to whether or not they welcomed a union within their plant. (*Martell Mills Co. vs. N. L. R. B.,* 114 Fed. (2nd) 624 (C. C. A. 4th, 1940).) In fact, there is not a charge against the petitioner based on any single action of any officer or superintendent seeking to interfere with, restrain or coerce the men in their relations with the International Association of Machinists, the union filing the complaint in this case.

## CONCLUSION.

We believe that the decision below gives an erroneous construction on both of the points mentioned and that it is of vital interest to both labor and capital that this Court correct this misconstruction of the National Labor Relations Act by reviewing and reversing the decision of the Circuit

Court and by giving an authoritative statement of the law applicable to this case.

Respectfully submitted,

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